No. 80-854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEONARD J. KERPELMAN,

Petitioner,

v.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

HENRY J. MYERBERG
Assistant Bar Counsel
District Court Building
Taylor Avenue and Rowe Blvd.
Annapolis, Maryland 21401
Telephone: (301) 269-2791

M. PETER MOSER
ALAN I. BARON
1300 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Telephone: (301) 547-0500

January 26, 1981

The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED FOR REVIEW

Petitioner has set out approximately 19 questions which he contends are presented for review. Respondent respectfully suggests, however, that the only real issues are (1) *whether the evidence is sufficient to permit the State of Maryland to impose a two year suspension on an attorney for wilfull misrepresentations to a client and for knowingly advising another client to violate a court decree; and (2) whether this Court should consider imposing on the states a requirement, contrary to almost universal practice, that an attorney charged with misconduct must be accorded the right to a jury trial in disciplinary proceedings.*

Respondent submits that these are not issues which warrant a review by the Supreme Court. The issues present no conflict with any other state court decision and no important federal question which should be decided by this Court. See Supreme Court Rules 17.1 (b), 17.1 (c).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS	ix
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I. PETITIONER WAS NOT DENIED DUE PROCESS BY ANY PROCEDURES APPLIED IN THIS CASE	5
A. The Court Of Appeals Did Not Ignore Petitioner's Exception 15 Or Delegate Decision Making To A Single Judge So As To Deny Petitioner Due Process	6
B. The Maryland Attorney Disciplinary System Accords An Attorney Charged With Misconduct All Of The Due Process Rights Required By The Federal Constitution	7
1. The Maryland Rules governing attorney discipline (BV Rules) afford due process, including fair notice and an opportunity to be heard	8
2. Provision that hearings of formal charges shall not be stayed or delayed because of alleged procedural errors occurring *before* the charges are filed is not a denial of due process	10

PAGE

3. Provision that charges are heard by a designated judge in a "court" accords with the Maryland Constitution and does not violate any due process right 11

4. The appeal by way of exception affords procedural due process 13

C. The Manner Of Applying The Clear And Convincing Evidence Standard Of Proof In This Case Raises No Due Process Issue 13

D. Petitioner's Claimed Insufficiency In The Evidence Raises No Due Process Issues 15

II. PETITIONER WAS NOT DENIED DUE PROCESS OR EQUAL PROTECTION OF THE LAW BY VIRTUE OF BEING DISCIPLINED PURSUANT TO THE PROVISIONS OF THE ATTORNEY DISCIPLINARY RULES 16

III. THE DETERMINATION THAT PETITIONER HAD VIOLATED, *INTER ALIA*, DISCIPLINARY RULE 1-102(A)(6) BY COUNSELING A CLIENT TO SEIZE A CHILD IN KNOWING VIOLATION OF A COURT ORDER DID NOT DENY PETITIONER DUE PROCESS 17

IV. ASSESSMENT OF COSTS AGAINST PETITIONER BY THE MARYLAND COURT OF APPEALS, PURSUANT TO ITS ESTABLISHED RULES, DID NOT CONSTITUTE A BILL OF ATTAINDER, A FORFEITURE OR A DENIAL OF DUE PROCESS 19

PAGE

V. PETITIONER WAS NOT UNCONSTITUTIONALLY DEPRIVED OF ANY RIGHT TO TRIAL BY JURY BECAUSE NO SUCH RIGHT EXISTS IN AN ATTORNEY DISCIPLINARY PROCEEDING 21

VI. PETITIONER IS SUBJECT TO SANCTIONS FOR VIOLATION OF THE DISCIPLINARY RULES IN ADVISING A CLIENT TO ACT IN DIRECT CONTRAVENTION OF A VALID COURT ORDER 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Attorney Grievance Commission v. Bailey, 285 Md. 631, 403 A.2d 1261 (1979) 11

Attorney Grievance Commission v. Stewart, 285 Md. 251, 401 A.2d 1026 (1979), *cert. denied*, 444 U.S. 845 (1979), *rehearing denied* 444 U.S. 975 (1979) 11

Attorney Grievance Commission v. Walman, 280 Md. 453, 374 A.2d 354 (1977) 9

Attorney Grievance Commission v. Willcher, 287 Md. 74, 411 A.2d 83 (1980) 12

Balliet v. Baltimore County Bar Association, 259 Md. 474, 270 A.2d 465 (1970) 14

Bar Association v. Cockrell, 270 Md. 686, 313 A.2d 816 (1974) 9, 16

Bar Association v. Cockrell, 274 Md. 279, 334 A.2d 85 (1975) 9

Barsky v. Board of Regents, 347 U.S. 442, 74 S. Ct. 650, 98 L. Ed. 829 (1954) 13

	PAGE
Berkey v. Delia, 287 Md. 302, 413 A.2d 170 (1980)	14
Colten v. Kentucky, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972)	19
Emmons v. Smitt, 149 F.2d 869 (6th Cir. 1945), *cert. denied,* 326 U.S. 746 (1945)	8
Ex Parte Brounshall, 98 Eng. Rep. 1385 (K.B. 1778)	17
Ex Parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883)	17, 21
Iacaponi v. New Amsterdam Casualty Company, 258 F. Supp. 880, (W.D. Pa. 1966) *affd.*, 379 F.2d 311 (3d Cir. 1967), *cert. denied,* 389 U.S. 1054, 88 S. Ct. 802, 19 L. Ed. 2d 849 (1968)	22
In Re Cannon, 206 Wis. 374, 240 N.W. 441 (1932)	17
In Re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1947)	8
In Re Stump, 272 Ky. 593, 114 S.W.2d 1094 (1938)	17
Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972)	13
Maness v. Meyers, 419 U.S. 449, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975)	23, 24
Maryland State Bar Association v. Agnew, 271 Md. 543, 318 A.2d 811 (1974)	14
Maryland State Bar Association v. Sugarman, 273 Md. 306, 329 A.2d 1 (1974), *cert. denied,* 420 U.S. 974 (1975)	21
Meffert v. Packer, 66 Kan. 710, 72 Pac. 247 (1903), *affd. without opinion,* 195 U.S. 625 (1904)	21
Neblett v. Carpenter, 305 U.S. 297, 59 S. Ct. 170, 83 L. Ed. 182 (1938), *rehearing denied,* 305 U.S. 675 (1939)	8

PAGE

Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) 20

Office of the Disciplinary Counsel v. Campbell, 463 Pa. 472, 345 A.2d 616 (1975), *cert. denied*, 424 U.S. 926 (1976) 18

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978) 24

Olesen v. Trust Company of Chicago, 245 F.2d 522 (7th Cir. 1957), *cert. denied*, 355 U.S. 896, 78 S. Ct. 270, 2 L. Ed. 2d 193 (1957) 22

Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974) 19

Reese v. Mandel, 224 Md. 121, 167 A.2d 111 (1961) 20

Simon v. Craft, 182 U.S. 427, 21 S. Ct. 836, 45 L. Ed. 1165 (1901) 8

Smith v. Goguen, 415 U.S. 556, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974) 18

Spevak v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) 16, 21

Terrazas v. Vance, 577 F.2d 7 (7th Cir. 1978), *rev'd*, 444 U.S. 252, *rehearing denied*, 445 U.S. 920 (1980) 13, 14

United States v. National Dairy Products Corporation, 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963) 19

United States v. United Mine Workers, 330 U.S. 258, 67 S. Ct. 677, 91 L. ed. 884 (1947) 23

Constitutional Provisions

Article 1, Section 10, Clause 1, United States Constitution 20

First Amendment, United States Constitution 23, 24

PAGE

Fifth Amendment, United States Constitution 21

Seventh Amendment, United States Constitution 21, 22

Fourteenth Amendment, United States Constitution 13, 22, 24

Declaration of Rights, Article 27, Maryland Constitution 9A Annotated Code of Maryland 111 (1977) 19

Article 4, Maryland Constitution, 9A Annotated Code of Maryland 230 (1977) 11, 12

Article 4, Section 18, Maryland Constitution, 9A Annotated Code of Maryland, Cumulative Supplement, 62 (1979) 12

Statutes

Article 10, Section 15, 1 Annotated Code of Maryland 359 (1976) 10

Maryland Laws, Chapter 305 (1977) 10

Statute of Westminster the First, 3 Edw. 1, C. 29 (1275) 16

Article 320a-1, Section 15(a), 1A Texas Civil Statutes, Annotated, Cumulative Pocket Part, 47 (1980) 22

Rules

Rule 17.1, Rules of the United States Supreme Court i

Rule 4-214, Rules and Regulations for the Organizations and Governments of the State Bar of Georgia (1977) 22

Rule 5, Maryland Rules of Procedure, Volume 9B, Annotated Code of Maryland 12

Rule 1230, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 2

PAGE

Rule BV 1F, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 12

Rule BV 6, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 9

Rule BV 7, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland ... 9

Rule BV 9, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 9, 10, 11

Rule BV 10, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 9, 10, 12, 14

Rule BV 11, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 10

Rule BV 15, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 19

Texts

30 Am. Jur. 2d, Evidence, Section 1167 14

6 Moore's Federal Practice, 54.70[2] 20

Problems and Recommendations in Disciplinary Enforcement, American Bar Association, Special Committee on Evaluation of Disciplinary Enforcement, Honorable Tom Clark, Chairman, June, 1970 22

Law Review Articles

Disbarment in the United States: Who shall do the noisome work? 12 Columbia Journal of Law and Social Problems 1 (1975) 16

Potts, *Disbarment Procedures,* 24 Tex. L. Rev. 161 (1946) 22

Potts, *Trial by Jury in Disbarment Proceedings,* 11 Tex. L. Rev. 28 (1932) 22

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

ARTICLE 4, SECTION 18, MARYLAND CONSTITUTION (in R.A. at 129)

ARTICLE 10, SECTION 15, ANNOTATED CODE OF MARYLAND

> Said charges shall be heard before two or more judges of the judicial circuit in which said court, wherein such charges have been filed, is located, and the accused attorney shall be afforded full opportunity to be heard and, unless the accused attorney shall in writing elect otherwise, all the testimony taken at said hearing shall be taken down by a stenographer and transcribed as in civil cases. Said hearing shall be governed by the rules of law, evidence and procedure of civil cases, so far as the same may be applicable thereto.

MARYLAND LAWS, 1977, CHAPTER 305 (in R.A. at 130-131)

STATUTE OF WESTMINSTER THE FIRST, 3 Edw. 1 c.29 (1275)

> It is provided also, That if any Serjeant, Pleader, or other, do any Manner of Deceit or Collusion in the King's Court, or consent unto it, in Deceit of the Court, or to beguile the Court, or the Party, and thereof be attained, he shall be imprisoned for a Year and a Day, and from thenceforth shall not be heard to plead in that Court for any Man . . .

ARTICLE 320 a-1, SECTION 15(a), 1A TEXAS CIVIL STATUTES ANNOTATED, CUMULATIVE POCKET PART, 47 (1980)

> The Supreme Court of Texas shall not adopt or promulgate any rule or regulation abrogating the right of trial by jury to either party to a disbarment action in the county of the residence of the accused attorney.

RULE 17.1, RULES OF THE UNITED STATES SUPREME COURT

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceeding, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

RULE 4-214, RULES AND REGULATIONS FOR THE ORGANIZATIONS AND GOVERNMENTS OF THE STATE BAR OF GEORGIA (1977)

Respondent attorney's right to trial by jury:

Special questions—

(a) In all cases the Respondent attorney shall have the right to have any material issues of fact determined by a jury in the Superior Court of a county of the member's residence, or in the case where the attorney is a non-resident, by a jury in the Superior Court selected under the provisions of Rule 4-221(c),

(b) The Respondent attorney shall move for trial by jury in writing, at or before the time his answer to the formal complaint is due, in the absence of a written motion the Respondent attorney will be deemed to have chosen to have all material issues of fact forwarded by the State Disciplinary Board,

(c) If the Respondent attorney shall have elected trial by jury the parties shall then frame separate special questions of fact to be submitted to the jury in the case of disagreement between the parties as to the form of the questions to be submitted the Superior Court judge shall frame questions based upon the pleadings and evidence at the time of trial.

RULE 5i, MARYLAND RULES OF PROCEDURE, Vol. 9B ANNOTATED CODE OF MARYLAND

"Court" means the Circuit Court for any county, the Superior Court of Baltimore City, the Court of Common Pleas of Baltimore City, the Baltimore City Court, the Circuit Court of Baltimore City, and the Circuit Court No. 2 of Baltimore City, Criminal Court of Baltimore, but not the Supreme Bench of Baltimore City or the District Court except as expressly otherwise provided, or may result from necessary implication. The word "court" shall include a court of law and a court of equity.

RULE 1230, MARYLAND RULES OF PROCEDURE, Vol. 9C ANNOTATED CODE OF MARYLAND (in R.A. at 160)

SUBTITLE BV, MARYLAND RULES OF PROCEDURE, Ch. 1100, DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS (in R.A. at 132-159)

No. 80-854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEONARD J. KERPELMAN,

Petitioner,

v.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" (Pet. at 3-10) fails to summarize the proceedings and is simply argument. Therefore, Respondent supplements Petitioner's Statement here.

The Trial Judge designated by the Court of Appeals, after about 30 days of evidentiary hearings and argument, found facts by clear and convincing evidence from which he concluded that Petitioner had violated DR 1-102(A) (1), (4), (5) and (6); DR 7-102(A) (7); and DR 7-106(A) of the Code of Professional Responsibility (CPR). After considering Petitioner's Exceptions, Bar Counsel's Exceptions and oral argument, the Court of Appeals agreed that the findings and conclusions made by the Trial Judge were

supported by clear and convincing evidence and suspended Petitioner from practice of law for two years.[1]

The Trial Judge and the Court of Appeals agreed that three separate violations of the CPR were proven by clear and convincing evidence. First, Petitioner represented to his client Malcomb that his total fee for the services in a child custody case would be $1,000 and no more, but maliciously escalated the fee (C.A. Op., P.S.A. at 5). Second, in order to justify an improper fee, Petitioner deliberately misrepresented to Malcomb that there remained more work to be done on his case and that Petitioner was working on it (C.A. Op., P.S.A. at 5). Third, Petitioner knowingly advised another client, Draper, to physically take his child from the child's mother, in violation of a court decree (C.A. Op., P.S.A. at 7).

The Trial Judge and the Court of Appeals also agreed that Petitioner's conduct violated certain Disciplinary Rules (DRs) of the CPR as alleged in the charges (C.A. Op., P.S.A. at 2; see n.1). In misrepresenting his fee to Malcomb, Petitioner violated DR 1-102(A) (4) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; DR 1-102(A) (5) by engaging in conduct prejudical to the administration of justice; DR 1-102(A) (6) by engaging in other conduct adversely reflecting on his fitness to practice law; and DR 1-102(A) (1), which states that a lawyer shall not violate a disciplinary rule (C.A. Op., P.S.A. at 5). Petitioner's misrepresentations to Malcomb that there was more work to be done and that he was doing it were similarly found to have violated DRs 1-102(A) (4) and 1-102(A) (6). Petitioner's advice to Draper

[1] The Trial Judge's Opinion (T. Op.) is reproduced in the Appendix to this Brief (R.A.) at 25-128. The Court of Appeals' Opinion (C.A. Op.), 288 Md. 341, 420 A.2d 940 (1980), is in Petitioner's Supplemental Appendix (P.S.A.), except the appendix to that Opinion. The appendix to C.A. Op. is in R.A. at 2-24. The CPR is made applicable to govern the conduct of attorneys in Maryland by Rule 1230 (R.A. at 160).

to get the child in knowing violation of a decree violated DRs 1-102(A) (1), 1-102(A) (4), 1-102(A) (5) and 1-102(A) (6), as well as DR 7-102(A) (4), 1-102(A) (5) and 1-102(A) (6), as well as DR 7-102(A) (7) (counseling a client in conduct known to be illegal or fraudulent) and DR 7-106(A) (advising a client to disregard a ruling of a tribunal) (C.A. Op., P.S.A. at 7, 18-20).

The Trial Judge dismissed other charges because he could not find clear and convincing evidence to sustain the DR violations. The Court of Appeals agreed. The dismissed violations charged Petitioner with violating DR 2-102(A) (2) by withholding Malcomb's papers after withdrawal of employment and continuing to deal with the judge in the case after discharge; with violations of DR 6-101(A) (2) in both the Malcomb and Draper cases by handling legal matters without adequate preparation; and with misrepresenting to Draper the amount of the fee which he would charge in the custody case (C.A. Op., P.S.A. at 5, 7).

In determining whether to impose disbarment or a lesser sanction, the Court of Appeals considered these factors: Petitioner's apparently unblemished prior professional record; that disciplinary proceedings are for protection of the public, and not for punishment; the nature of Petitioner's misconduct; and the effect of Petitioner's misconduct upon his client, upon the public and upon the administration of justice (P.S.A. at 20-21). The Court of Appeals specifically refused to consider an inference that the Draper case was not the only time Petitioner counseled a client to disregard a court order, noting that had this been properly charged and proven, the Court would have disbarred Petitioner (P.S.A. at 21).[2]

[2] Apparently, Mr. Kerpelman first admitted and then denied advising other clients to "violate court orders" (T. Op. at 64, C.A. Op., P.S.A. at 11, 19-20). The testimony of another of Mr. Kerpelman's clients, admitted solely on the issue of credibility, also supported the inference (C.A. Op., P.S.A. at 11).

SUMMARY OF ARGUMENT

I. Petitioner was afforded fair notice of all of the charges as well as a full evidentiary hearing and opportunity to controvert the charges. The Trial Judge, in an opinion carefully weighing all of the evidence, after considering oral argument and written briefs, concluded that some of the charges were supported by clear and convincing evidence, but that other charges were not. Having considered all of Petitioner's Exceptions, the Court of Appeals agreed with the findings and conclusions of the Trial Judge. On this record, there is manifestly no basis to find either that Petitioner was denied due process of law or that the Maryland Rules applicable to attorney disciplinary proceedings are constitutionally deficient in any respect.

II. Attorneys in this country and in England always have been recognized as performing a fundamental role in the administration of justice. Unquestionably there is a rational basis for providing attorney disciplinary procedures applicable solely to lawyers without violating their equal protection or due process rights.

III. When a lawyer is clearly charged with making wilfull misrepresentations to one client and with knowingly counseling another to violate a court order, no basis exists for a claim that one of several disciplinary rules violated by the misconduct is unconstitutionally vague. Here, Petitioner had fair notice that his specified conduct was prohibited by DR 1-102(A) (6) ("conduct that adversely reflects on his fitness to practice law"), and he cannot attack the Rule simply because, on other facts, it might not afford a lawyer fair notice of the charges.

IV. Because costs of the proceedings were assessed against Petitioner pursuant to Rule as a part of established judicial process, no basis exists for a claim that this

action is a "bill of attainder" or "forfeiture" or denies him due process.

V. The constitutional right to a jury trial never has been accorded lawyers charged with misconduct in disciplinary proceedings. This Court should not consider imposing such a constitutional requirement on the states because to do so would seriously disserve the public.

VI. No First Amendment free speech rights are violated where a state high court disciplines a lawyer for counseling his client to seize a child in knowing disregard of a court decree and in clear violation of a disciplinary rule, where disregarding the court order is not necessary to protect any constitutional right.

ARGUMENT

I.

PETITIONER WAS NOT DENIED DUE PROCESS BY ANY PROCEDURES APPLIED IN THIS CASE.

(Petitioner's Questions I.A., I.B.1, I.B.2., I.B.3., I.B.5., I.D., I.E., I.F., I.G. and I.H.)

Petitioner's broadside due process attack can be considered under four general categories: (A) alleged defects in the review by the Court of Appeals in his case (Question I.A.); (B) claimed denial of due process as a result of certain features of the Maryland Rules relating to attorney discipline (Questions I.B.1., I.B.2., I.B.3., I.B.5., I.D. and I.E.); (C) asserted misapplication of the clear and convincing evidence standard (Questions I.B.4. and I.C.); and (D) insufficiency in evidence to prove some of the findings and conclusions upheld by the Court of Appeals (Questions I.F., I.G. and I.H.).[3]

[3] The claimed due process violation in applying the disciplinary procedures to practicing attorneys only (part of Question I.B.1.) is considered in Part II, along with asserted denial of equal protection. Petitioner's allegations that DR 1-102(A) (6) is

A. THE COURT OF APPEALS DID NOT IGNORE PETITIONER'S EXCEPTION 15 OR DELEGATE DECISION MAKING TO A SINGLE JUDGE SO AS TO DENY PETITIONER DUE PROCESS.

(Petitioner's Question I.A.; argued in Pet. at 7-8, 10-17)

Petitioner argues that the Court of Appeals did not rule on an "important exception" (Exception 15) to the Trial Judge's findings. Petitioner then makes the bootstrap argument that for this reason the Court of Appeals must have improperly delegated its "justiciating function" to the single judge who wrote the opinion. Petitioner's assertions are without merit mainly because the Court of Appeals specifically ruled in Exception 15 and denied reconsideration when Petitioner claimed that the Court had not ruled on it.

Petitioner's Exception 15 (Pet. at 6A; R.A. at 161) alleges that the initial fee agreement with Malcomb was for a $1,000 retainer plus additional fees at a later time, rather than for a $1,000 flat fee. Petitioner says the Court of Appeals failed to consider his Exception 15 based solely on the fact that the Court grouped Exception 15 with the six other exceptions to facilitate its rulings, stating:

> 10-16 inclusive — Alleged bias, prejudice, etc., of Judge Levin.
>
> These contentions are without merit (P.S.A. at 10).

Respondent is aware of no principle of law which requires a court to address every worthless contention raised by a party. Moreover, it is clear that the Court ruled on Exception 15. Petitioner grouped Exception 15 in the midst of six other exceptions (10-16, R.A. at 161). All seven exceptions relate to "Levin's" (the Trial Judge's)

---

unconstitutionally vague (Question I.I.) is discussed in Part III. Petitioner's claim that his being required to pay court costs is a "forfeiture" (Question I.J.) is addressed in Part IV.

"bias" (10), "Prejudice" (11), "inflammatory statements" (12), "statements . . . of matters . . . not in evidence" (13), "statements . . . concerning . . . matters which had nothing to do with any charges . . . and which biased and prejudiced the case" (14), ignoring "the existence and receipt . . . of the bill of January 16th. . .", which was "nowhere explained" (15)[4], and "near-ludicrous analysis of the evidence as to the Malcomb fee" (16). Petitioner obviously intended all these exceptions to support his frivolous and repeated charges that the Trial Judge was prejudiced — charges which the Court of Appeals considered and rejected as being "without merit" (P.S.A. at 10; see also P.S.A. at 12, 18).

Since the Court in fact ruled on Exception 15 in an opinion joined by all seven judges (P.S.A. at 2), there is no inference "from the fact that not one of the seven appeals court judges seems to have noticed the failure to rule on Exception 15" to support the claim of improper delegation of the "justiciating function" (Pet. at 17).

B. The Maryland Attorney Disciplinary System Accords An Attorney Charged With Misconduct All Of The Due Process Rights Required By The Federal Constitution.

(Petitioner's Questions I.B.1.-3., 5.; I.D., I.E.; argued in Pet. at 18-29)

Petitioner claims that he has been denied due process because the Court of Appeals has created a "new type of court proceeding" with these features: absence of checks or

[4] Contrary to Petitioner's assertion, the Trial Judge specifically considered the January 16th bill in his opinion (T. Op., R.A. at 87). The Trial Judge found: "I believe him [Malcomb] when he denied receiving any January 16, 1976 bill ('Further Retainer') . . . . Here Malcomb was in court, he underwent a blistering and humiliating cross-examination by respondent [Kerpelman] and maintained his composure and credibility" (Tr. Op., R.A. at 89; see also 85).

balances and "elemental" due process safeguards; provision that an attorney may not take advantage of procedural errors; reference of fact-finding functions to a master; establishment of a special court in usurpation of a right reserved to the people by Maryland Constitution, Article IV; and allowance of an appeal only by way of exceptions, which he claims is arbitrary and limited (Pet. at ii.-iv.). Petitioner cites no relevant authorities for these propositions and there are none. Neither does he explain how the asserted defects unconstitutionally prejudiced him or would prejudice any other attorney, because they do not.[5]

1. *The Maryland Rules governing attorney discipline (BV Rules) afford due process, including fair notice and an opportunity to be heard.*

It is clear that the license of an attorney to practice law must not be arbitrarily terminated or adversely affected without according procedural due process. *In re Oliver*, 333 U.S. 257 (1947). The essential elements of procedural due process are fair notice of the charges and an opportunity to be heard. *Simon v. Craft*, 182 U.S. 427, 436 (1901). The BV Rules amply afford these rights to an attorney accused of misconduct.

Before any complaint reaches the stage where formal public charges are filed, the facts alleged must be investigated, presented to an Inquiry Panel for hearing

[5] To the extent that Petitioner argues that the Court in adopting the BV Rules misconstrued the Maryland Constitution and laws, such misconstruction would not be a denial of due process. Construing state constitutions, laws and rules are state questions left to the determination of state courts. *E.g., Neblett v. Carpenter*, 305 U.S. 297 (1938), rehearing den., 305 U.S. 675 (1939) (no denial of due process by state court having allegedly construed a state law incorrectly); *Emmons v. Smitt*, 149 F.2d 869 (6th Cir. 1945), *cert. den.*, 326 U.S. 746 (1945) (no federal jurisdiction to entertain an attack on state legislation or state activity as in violation of the state constitution if no substantial federal question presented).

and reviewed by the Rev. w Board.[6] Notice of the nature of the complaint is a prerequisite (Rule BV 6a4). No action other than dismissal of the complaint may be taken, unless the attorney is given an opportunity to examine and controvert the complaint and be represented by counsel (Rule BV 6d). The attorney can depose witnesses who cannot appear (Rule BV 6d3) and summons witnesses and documents (Rule BV 6d3(c)).

Bar Counsel files charges against an attorney *only* at the direction of the Review Board after the Board has reviewed the case (Rules BV 7b, BV 9a). The charges, which are filed in the Court of Appeals, must be ". . . sufficiently clear and specific reasonably to inform the attorney . . . of any misconduct charged . . ." Rules BV 9b, BV 9c; see also *Bar Association v. Cockrell,* 270 Md. 686, 692 (1974) (charges must be sufficiently clear and specific to make the attorney aware of what he is compelled to answer for and defend against).[7]

The Court of Appeals transmits the charges for a hearing in any court within the State and designates the judge or judges to hear the charges (Rule BV 9b, BV 10c).[8]

[6] Rules BV 6 (Complaints and Investigations) and BV 7 (Review Procedure). The Maryland BV Rules are at R.A. 132-59. A hearing may be waived, and none is required where the attorney has been convicted of a serious crime or has been found guilty of misconduct by another court. Rule BV 6b. However, not even a private reprimand may be administered if the attorney requests a trial of formal charges by a court (Rule BV 7c).

[7] This requirement is strictly applied. See *Bar Association v. Cockrell,* 274 Md. 279, 284-287 (1975); *Attorney Grievance Commission v. Walman,* 280 Md. 453, 463-464 (1977) (attorney's failure to file Maryland income tax returns, disclosed for the first time at a hearing on other charges, could not be used to justify a more severe sanction than that called for by the specified charges).

[8] Petitioner prints an earlier version of Rule BV 10c (Pet. at 15A). Rule BV 10c, as amended September 22, 1978 (R.A. at [49]), calls for a hearing by one judge provided, upon petition by the attorney or the Commission "for good cause shown or on its

The attorney is served with the charges and may seek transfer to another court (Rules BV 9d, 9e1). Full discovery is accorded (Rule BV 10a). "The hearing of charges is governed by the same rules of law, evidence and procedure as are applicable to the trial of civil proceedings in equity" (Rule BV 10d).

Following the evidentiary hearing, the assigned judge files written findings of fact and conclusions of law (Rule BV 11a); the record goes to the Court of Appeals (Rule BV 11b1); the attorney charged and Bar Counsel each may file exceptions and answers to any exceptions filed by the other (Rule BV 11b2); and the case is argued in the Court of Appeals (Rule BV 11b3, 4, 5).

Respondent respectfully submits that these procedures assure an attorney charged with misconduct many more procedural rights and safeguards than due process requires.

2. *Provision that hearings of formal charges shall not be stayed or delayed because of alleged procedural errors occurring* before *the charges are filed is not a denial of due process.*

Petitioner asserts "that no 'procedural' errors may be taken advantage of by the defendant (BV 10b)" (Pet. at ii, 27), another claimed denial of due process. However, Rule BV 10b states only: "The hearing of charges shall *not be stayed or challenged* by reason of any procedural defects *alleged to have occurred prior to the filing of charges*" (R.A. at 149, emphasis added). Prior to the filing of formal charges in the Court of Appeals, the proceedings on

---

own motion the Court may designate two additional judges to consider the charges" (R.A. at 149). Petitioner also asserts a violation of due process because of a claimed conflict between this procedure and that specified in Maryland Ann. Code, Art. 10, § 15. However, § 15 was repealed effective July 1, 1977 (Md. Laws, Ch. 305, 1977, R.A. at 130-31).

complaints against attorneys are similar to grand jury proceedings, are investigatory in nature and are for the purpose of determining whether to institute disciplinary action. *Attorney Grievance Commission v. Stewart,* 285 Md. 251, 259 (1979), *cert. den.,* 444 U.S. 845 (1979) rehearing den., 444 U.S. 975 (1979). Formal charges of misconduct do not exist against an attorney until the charges are filed in the Court of Appeals. *Attorney Grievance Commission v. Bailey,* 285 Md. 631, 637 (1979).

Moreover, Petitioner cites no instance where his due process rights were violated at these earlier proceedings. His claim that the mere existence of Rule 10b somehow denies him due process is without merit.

3. *Provision that charges are heard by a designated judge in a "court" accords with the Maryland Constitution and does not violate any due process right.*

Petitioner asserts that the procedure for the hearing of charges violates his due process rights in two ways. First, that this establishes a new court not provided for in the Maryland Constitution, in usurpation of the powers reserved to the people by the Maryland Constitution, Article IV (Pet. at 22). Second, that this amounts to an unconstitutional "Non-Consensual Reference to a Master" (Pet. at 18). The Court of Appeals considered and rejected these or similar assertions (P.S.A. at 16, 17).[9] Petitioner's assertions are meritless even assuming that Federal due process issues are involved.

The charges are heard in a "court" by a "judge or judges" (Rule BV 9b). The term "court" is defined as "the location where the judge or judges will conduct the hearing and includes the Supreme Bench of Baltimore City" (Rule BV

[9] Petitioner seems to have asserted below *only* that the procedure involved usurpation of the *legislative* power.

1f).[10] The "court" referred to is one created pursuant to the provisions of Article IV of the Constitution.

Moreover, the provisions of Maryland Constitution, Article IV, authorizes the Court of Appeals to make procedural rules (§ 18, R.A. at 129). The BV Rules are procedural rules promulgated pursuant to Section 18. Accordingly, there has been no proceeding adopted in violation of Article IV or any usurpation of rights guaranteed thereby to the people, as Petitioner asserts.

It is perfectly proper for a court to refer cases to masters to hear the evidence, as the Court of Appeals notes in dismissing the contention of Petitioner that this is improper (P.S.A. at 16). Moreover, although the "hearing judge's findings have a force and effect similar to those in a master's report in equity," *e.g., Attorney Grievance Commission v. Willcher,* 287 Md. 74, 77 (1980), the "hearing of the charges is governed by the same rules of law, evidence and procedure" as apply in an equity trial (BV 10d). Thus the attorney is accorded a trial before a judge with all requisite due process protections. See also, Section I.A.2., *supra.* No authority suggests any due process requirement that an attorney consent to have charges of misconduct tried by this procedure. For these reasons Petitioner's argument that reference to a master amounts to a denial of due process is without merit.

[10] Maryland Rule 5 (General Definitions) also defines the term: " 'Court' means the Circuit Court for any county, the Superior Court of Baltimore City, the Court of Common Pleas of Baltimore City, the Baltimore City Court, the Circuit Court of Baltimore City and the Circuit Court No. 2 of Baltimore City, a Criminal Court of Baltimore, but not the Supreme Bench of Baltimore City or the District Court except as expressly otherwise provided, or may result from necessary implication . . ." (Rule 5i).

4. *The appeal by way of exception accords procedural due process.*

There is equally no merit in Petitioner's claim that an appeal by way of exceptions is "not a due process appeal but is arbitrary and limited" (Pet. at iii). First, a right of appeal is not even a prerequisite of procedural due process if a full and fair trial on the merits is provided. *E.g., Lindsey v. Normet,* 405 U.S. 56, 77 (1972); see also *Barsky v. Board of Regents,* 347 U.S. 442, 470 (1954) (Frankfurter, J., dissenting, recognizes that not even judicial review is a requirement in proceedings to suspend or revoke a physician's license). Second, the Court of Appeals makes it clear that the standard of review of a trial judge's findings and conclusions in attorney disciplinary cases is essentially the same "clearly erroneous" standard of review which applies in cases where a judge hears a case without a jury (P.S.A. at 7).

C. The Manner Of Applying The Clear And Convincing Evidence Standard Of proof In This Case Raises No Due Process Issue.

(Petitioner's Questions I.B.4. and I.C.; argued in Pet. at 30-36)

Petitioner alleges that he was denied due process by the manner of application of the clear and convincing evidence standard of proof. His only authority is a case that was reversed, *Terrazas v. Vance,* 577 F.2d 7 (7th Cir. 1978), *rev'd.,* 444 U.S. 252, *rehearing den.,* 445 U.S. 920 (1980). The Seventh Circuit had ruled that when U.S. citizenship was at stake, the Fourteenth Amendment required application of a clear and convincing test to prove voluntary relinquishment of citizenship rather than the preponderance test provided by Congress. The Supreme Court reversed and held that the clear and convincing evidence standard was not constitutionally compelled. Noting that it had previously recognized the importance of citizenship

and a decided preference for requiring clear and convincing evidence to prove expatriation, the Supreme Court reasoned that, unlike criminal and involuntary commitment cases, "expatriation proceedings are civil in nature and do not threaten a loss of liberty." 444 U.S. at 266.

The same reasoning applies where an attorney faces sanction for misconduct. Disciplinary proceedings do not threaten the loss of liberty. Neither are they criminal proceedings. *E.g., Balliet v. Baltimore County Bar Association,* 259 Md. 474, 478 (1970). Disciplinary proceedings are for the purposes of maintaining the integrity of the bar and to protect the public, not for punishment. *E.g., Maryland State Bar Association v. Agnew,* 271 Md. 543, 549 (1974). Accordingly, the courts or legislatures *could* provide for a preponderance standard of proof of misconduct by an attorney. Therefore, no due process question is raised even had the clear and convincing test not been applied in this case.

However, the clear and convincing standard was applied properly in this case, as required by the Maryland Rules (Rule BV 10d). This standard is defined by the Court of Appeals as being more than a preponderance of the evidence and less than evidence beyond a reasonable doubt, *Berkey v. Delia,* 287 Md. 302, 319-20 (1980). In *Berkey,* the Maryland Court explains that the requirement of clear and convincing evidence does not call for unanswerable or conclusive evidence:

> "Whether evidence is clear and convincing requires weighing, comparing, testing and judging its worth when considered in connection with all the facts and circumstances in evidence."

287 Md. at 320, quoting from 30 Am. Jur. 2d., Evidence § 1167.

The application of this test here resulted in rulings in Petitioner's favor with regard to some of the charges brought against him by the Commission, as well as rulings against Petitioner. See Statement of the Case, *supra*; T. Op., R.A. at 52-53, 60; C.A. Op., P.S.A. at 5, 7.

Moreover, Petitioner's argument that the clear and convincing standard was misapplied by the Trial Judge (Pet. at 32-35, 37-38) raises no more than a credibility issue and has nothing to do with due process. Petitioner is saying that the Trial Judge should have believed him and not Malcomb. The lengthy analysis of the evidence by the Trial Judge (R.A. 73-105) makes it clear that the proper weighing, comparing, testing and judging the worth of the evidence was applied. See also discussion by the Court of Appeals of (i) the proof in the Malcomb matter (P.S.A. at 10), and (ii) Bar Counsel's Exceptions (P.S.A. at 7-8).

D. Petitioner's Claimed Insufficiency In The Evidence Raises No Due Process Issues.

(Petitioner's Questions I.F., I.G. and I.H.; argued in Pet. at 32-35, 38; 29A-29B)

Petitioner argues that any ambiguities in the evidence relating to the Malcomb charges should have been resolved in his favor because all issues revolved around a "word against word confrontation" between Petitioner and Malcomb. Petitioner also asserts that the Malcomb case involved "a bona fide fee dispute only" (Pet. at iv), merely stating the question but not arguing the point. These also are credibility issues, not due process questions, and have been fully resolved by the Trial Judge (R.A. at 73-105) and by the Court of Appeals (P.S.A. at 14-15; see also 3-5).

Petitioner claims that the Court of Appeals adopted and relied on an unwarranted inference that in other instances, not part of the charges, Petitioner had advised clients to violate court orders. This misstates what the

Court of Appeals did. While the inference about which Petitioner complains *is* readily inferrable from the evidence (see P.S.A. at 11), the Court applied the due process requirements of notice and opportunity to be heard and specifically held "such other instances may not be used in determining the sanctions, [Petitioner] not having been charged with them," citing *Bar Association v. Cockrell,* 270 Md. 686 (1974) (P.S.A. at 21). See *supra,* n.7.

II.

PETITIONER WAS NOT DENIED DUE PROCESS OR EQUAL PROTECTION OF THE LAW BY VIRTUE OF BEING DISCIPLINED PURSUANT TO THE PROVISIONS OF THE ATTORNEY DISCIPLINARY RULES.

(Petitioner's Question 1.B.1. and II.; not argued)

Petitioner alleges that he was denied equal protection only in his statement of "Questions Presented for Review" (Pet. at v.). Petitioner apparently did not intend to elicit an answer to his question because he does not argue the point. He also asserts a due process objection to the Disciplinary Rules as a "proceeding . . . applicable to practicing attorneys only" (Pet. at ii.).

However, assuming an equal protection (or due process) issue is presented, it is without merit. An accepted principle in this country and in England is that "lawyers are officers of the Court who perform a fundamental role in the administration of justice." *Spevack v. Klein,* 358 U.S. 511, 524 (1967) (Fortas, J. concurring). As early as the Thirteenth Century, it was recognized that "the judiciary had the inherent power to regulate legal practitioners. . . ." *Disbarment in the United States: Who Shall Do the Noisome Work*? (hereafter "Disbarment"), 12 Col. J. of Law and Social Problems 1, 4 (1975), citing the Statute of Westminster the First, 3 Edw. 1, C. 29 (1275). This principle is today recognized in almost every state. See *Disbarment, supra,* at 8.

Moreover, as an officer of the court, the attorney has traditionally been held to higher standards of conduct than laymen. As stated by Lord Mansfield in *Ex Parte Brounshall,* 98 Eng. Rep. 1385 (K.B. 1778) "[T]he question is, whether after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion." See also *Ex Parte Wall,* 107 U.S. 265 (1883); *In re Stump,* 272 Ky. 593, 598 (1938); *In re Cannon,* 206 Wis. 374, 383 (1932). The lawyer's role as an officer of the court and his responsibility in the administration of justice has thus long been seen as subjecting the attorney to disciplinary proceedings relative to his professional status.

Petitioner's cryptic question suggests that it is somehow unconstitutional for a state to provide for disciplinary proceedings particularly applicable to lawyers. This notion flies in the face of nearly 700 years of English and American history, as well as the practice of virtually every state in the nation.

III.

THE DETERMINATION THAT PETITIONER HAD VIOLATED, *INTER ALIA,* DISCIPLINARY RULE 1-102(A) (6) BY COUNSELING A CLIENT TO SEIZE A CHILD IN KNOWING VIOLATION OF A COURT ORDER DID NOT DENY PETITIONER DUE PROCESS.

(Petitioner's Question I.I.; argued in Pet. at 36, 41)

Petitioner asserts that the finding that he violated Disciplinary Rule 1-102(A) (6) was improper in that he thereby "has been found guilty of an overbroad charge (P. 38, Opinion) which informed him of nothing concerning what it was he had to meet." (Pet. at 41). He alleges that "the charges were neither further defined, nor restricted by the facts in the case, in any way that is discernible in the opinion" (*ibid.*).

A reading of the Court of Appeals opinion establishes that Petitioner has failed to read or has misread the opinion. The conclusion that Mr. Kerpelman violated DR 1-102(A) (6) came at the end of a section of the Court's opinion captioned "Legal effect of counseling violation of a court decree" (P.S.A. at 18-20). It is clear that what is referred to is the *factual* finding that Mr. Kerpelman had counseled his client, Draper, to seize a child in violation of a valid court order (see discussion at C.A. Op., P.S.A. at 5-7). After several pages of factual and legal analysis, the Court of Appeals specifically states that it was "Kerpelman's conduct in the matter of the child" which amounted to a violation of DRs 1-102(A) (1), (4), (5), and (6), as well as DRs 7-102(A) (7) and 7-106(A). (See P.S.A. at 20).

To the extent that Mr. Kerpelman suggests that DR 1-102(A) (6) is itself too vague, his point is without merit, at least as applied to the particular conduct in which he engaged — counseling a client to violate a court order by child snatching. A similar argument was made in *Office of the Disciplinary Counsel v. Campbell,* 463 Pa. 472, 345 A.2d 616 (1975), *cert. den.,* 424 U.S. 926 (1976), where Campbell was charged with specific misconduct in violation of six DRs, 1-102(A) (3), (4), (5), (6), 7-102(A) (7), and 9-101(C). The Court said "all but two of these rules specify with great clarity the conduct prohibited." 345 A.2d at 621. The two exceptions were DRs 1-102(A) (5) and (6). The Court continued:

> Although these two rules are arguably vague, it does not necessarily follow that appellant's disbarment under these sections is constitutionally impermissible. A regulation or statute can be validly applied to some activities even though its application to other situations might be of uncertain constitutionality. *Smith v. Goguen,* 415 U.S. 556, 578, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974). Where one is on fair notice that his own conduct is within that prohibited by a regulation, he cannot attack the regulation simply

> "because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit." *Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 2563, 41 L. Ed. 2d 439 (1974). See also *Colten v. Kentucky*, 407 U.S. 104, 109-10, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972); and *United States v. National Dairy Products Corp.*, 372 U.S. 29, 31-32, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963). 345 A.2d at 621.

The Maryland Court of Appeals decided on the basis of clear and convincing evidence that Mr. Kerpelman violated DR 1-102(A) (6) because he counseled a client to seize a child in knowing violation of an outstanding court order. There is no vagueness in the Disciplinary Rules as applied in this or the other charges in his case because he had fair notice of the facts. Accordingly, this claim by Petitioner also is without merit.

IV.

ASSESSMENT OF COSTS AGAINST PETITIONER BY THE MARYLAND COURT OF APPEALS, PURSUANT TO ITS ESTABLISHED RULES, DID NOT CONSTITUTE A BILL OF ATTAINDER, A FORFEITURE OR A DENIAL OF DUE PROCESS.

(Petitioner's Question I.J.; argued in Pet. at 36, 42)

The Court of Appeals, pursuant Rules BV 15a. and BV 15c. (R.A. at 155, 156), ordered Petitioner to pay all costs of the proceedings, including the costs of all transcripts. The Court also ordered that Petitioner's suspension from the practice of law would not be terminated unless all costs were paid in full (P.S.A. at 21). Petitioner apparently contends that these actions by the Court constitute a bill of attainder, seemingly because costs were imposed pursuant to the Court's rules and not by statute. He further suggests that the imposition of costs is a "forfeiture" in violation of Article 27 of the Maryland Declaration of Rights (Pet. at 16A).

The power of the courts to assess costs is recognized under both English and American law. See discussion in 6 *Moore's Federal Practice,* 54.70[2] at 1302-03. Court costs are in the nature of incidental damages to reimburse the prevailing party for certain expenses involved in the assertion or defense of his rights in court. Imposition of court costs is not a punishment. See *e.g., Reese v. Mandel,* 224 Md. 121, 130 (1961).

Petitioner's argument that the imposition of costs by the Court is an unconstitutional bill of attainder is unfounded. Article I, § 10, clause 1 of the United States Constitution provides in pertinent part: "No state shall . . . pass any Bill of Attainder." The term "bill of attainder" has been defined to mean "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services,* 433 U.S. 425, 468 (1977). Thus, what is prohibited by the bill of attainder clause is in essence legislative punishment. There was no punishment here because the imposition of costs is not a penalty. Moreover, the costs were imposed by virtue of the judicial process, and not by any legislative act. Whatever Petitioner may be alleging, he can hardly claim that he has been denied a judicial trial. The assertion that this is a "forfeiture" in violation of the Maryland Constitution is not a federal question. See *supra,* n.5.

For these reasons, Petitioner's claim that the imposition of costs is unconstitutional is without merit.

V.

PETITIONER WAS NOT UNCONSTITUTIONALLY DEPRIVED OF ANY RIGHT TO TRIAL BY JURY BECAUSE NO SUCH RIGHT EXISTS IN AN ATTORNEY DISCIPLINARY PROCEEDING.

(Petitioner's Question III; argued in Pet. at 38-41)

The sole authority for Petitioner's Fifth Amendment argument that he is entitled to a jury trial is *Spevack v. Klein,* 385 U.S. 511 (1967). That case, in a plurality opinion, held only that a lawyer could not be disbarred for invoking the privilege against self-incrimination where his answers allegedly might have incriminated him. The Court did not say that a disciplinary proceeding was a criminal proceeding, and the decision does not hold or suggest that an attorney under these circumstances has the constitutional right to a trial by jury.

However, in *Ex Parte Wall,* 107 U.S. 265, 288 (1883), a case directly on point, the Court held that "the constitutional privilege of trial by jury for crimes does not apply to prevent the courts from punishing its officers for contempt, or from removing them in proper cases." See also *Meffert v. Packer,* 66 Kan. 710, 72 Pac. 247 (1903), *affd. without op.,* 195 U.S. 625 (1904) (due process does not require a court proceeding in revoking a physician's license); *Maryland State Bar Assn. v Sugarman,* 273 Md. 306, 318 (1974), *cert. den.,* 420 U.S. 974 (1975) (disbarment "is intended not as a punishment, but as protection to the public" and concluding, *inter alia,* an attorney disciplinary proceeding is not a criminal case within the purview of the Fifth Amendment); and C.A. Op., P.S.A. at 8-9 (where Petitioner's asserted right to a jury trial is considered).

Petitioner alternatively contends that he has been deprived of his rights under the Seventh Amendment to the United States Constitution in that his disciplinary proceeding was a "suit at common law, where the value in controversy . . . exceed[s] Twenty Dollars . . .". Peti-

tioner concedes that this argument turns on the willingness of the Court to rule that the Seventh Amendment right to civil jury trials is made applicable to the states by the Fourteenth Amendment. The Supreme Court has never so held, and several lower courts have held to the contrary. See, *e.g., Olesen v. Trust Co. of Chicago,* 245 F.2d 522 (6th Cir. 1957), *cert. den.,* 355 U.S. 896; *Iacaponi v. New Amsterdam Cas. Co.,* 258 F. Supp. 880 (D.C. Pa. 1966), affd., 379 F.2d 311 (3d Cir. 1967), *cert. den.,* 389 U.S. 1954 (1968).

Elevating the right of an attorney to a jury trial in disciplinary proceedings to the status of a constitutional requirement would serve only to weaken effective disciplinary enforcement by creating interminable delays.[11]

For all of these reasons, Petitioner's claim that he was unconstitutionally deprived of his right to jury trial does not present an issue which warrants the issuance of a writ of certiorari.

---

[11] Only two states now permit jury trials in their attorney disciplinary proceedings. Texas Civ. Stat. Ann. art. 320a-1, § 15(a) (1980); Rules and Regulations For The Organizations and Governments of State Bar of Georgia, R. 4-214 (1977). The practice is rarely used and where it is optional has served only to delay the proceedings. See Problems and Recommendations in Disciplinary Enforcement (ABA Special Committee on Evaluation of Disciplinary Enforcement, Hon. Tom C. Clark, Chairman, June, 1970) 136-137. The Clark Committee condemned the use of jury trials in attorney disciplinary proceedings, as have other commentators. See *e.g.,* Potts, Disbarment Procedure, 24 Tex. L. Rev. 161, 169 (1946); Potts, Trial By Jury in Disbarment Proceedings, 11 Tex. L. Rev. 28, 51 (1932).

VI.

PETITIONER IS SUBJECT TO SANCTIONS FOR VIOLATION OF THE DISCIPLINARY RULES IN ADVISING A CLIENT TO ACT IN DIRECT CONTRAVENTION OF A VALID COURT ORDER.

(Petitioner's Question IV.; argued in Pet. at 43-47)

It has long been recognized that orders and judgments of courts are to be complied with. The remedy for those who disagree with any court order is to appeal or to seek judicial reconsideration. Even if a court order is ultimately ruled incorrect, persons who make a private determination of the law in disregard of a judicial decree run the risk of severe sanctions. See *Maness v. Meyers,* 419 U.S. 449, 458 (1975). In *United States v. United Mine Workers,* 330 U.S. 258, 293 (1947), the Court held that the orderly administration of justice requires that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."

Here, the Court of Appeals held that "a lawyer may not advise his client to violate a law or court order, except in the instance of a test case where there is a good faith belief that the statute or order may be invalid" (P.S.A. at 19). The Court concluded on the basis of clear and convincing evidence that Mr. Kerpelman had advised his client to seize a child from the custody of its mother in disregard of a court order. The Court further concluded that "this was no test case, nor did the custody order compel the surrender of any constitutional right" (P.S.A. at 19-20). Petitioner nevertheless contends that it is a denial of his First Amendment right to free speech for the Court to find that his counseling of a client to disregard a court order is a violation of the Disciplinary Rules for which sanctions may be imposed.

Petitioner's attempt to place his contumacious advice within the embrace of the First Amendment is to no avail. In *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978), the Court upheld disciplinary action taken against an attorney for engaging in the personal solicitation of clients in violation of the Disciplinary Rules. The Court concluded that the State's interest in protecting the lay public, given the potential for overreaching, was sufficient to permit the application of the Disciplinary Rules without offense to the First or Fourteenth Amendments to the Constitution. 436 U.S. at 468.

The interest of the State of Maryland in preventing attorneys, who speak as officers of the court, from advising their clients to disregard court orders and take the law into their own hands, is manifest. This was no test case, nor was there any constitutional right surrendered by virtue of the custody order. Mr. Kerpelman could have sought a court order altering the custody arrangement. Indeed, he had prepared and filed such a petition in this very matter. (See C.A. Op., P.S.A. at 5, 20). Instead of pursuing this lawful avenue, Mr. Kerpelman advised his client to engage in self-help which might well have resulted in harm to the child as well as to the adults involved — all in clear violation of a court order. Such conduct is not protected by the First Amendment even though speech was a component of the activity. See *Maness v. Meyers, supra;* and *Ohralik v. Ohio State Bar Association, supra.*

CONCLUSION

Respondent respectfully submits that for all of these reasons, Petitioner's claims that he has been denied rights guaranteed by the United States Constitution do not present any issue which warrants the issuance of a writ of certiorari by this Court to the Court of Appeals of Maryland.

Respectfully submitted,

HENRY J. MYERBERG
Assistant Bar Counsel
District Court Building
Taylor Avenue and Rowe Blvd.
Annapolis, Maryland 21401
Telephone: (301) 269-2791

M. PETER MOSER
ALAN I. BARON
1300 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Telephone: (301) 547-0500

January 26, 1981